

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
UNITED STATES DEPARTMENT OF JUSTICE
MODEL CERCLA ABILITY TO PAY PERIPHERAL PARTY CASHOUT CONSENT
DECREE**

[NOTE: This Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree is designed to be used in conjunction with the “Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority” (signed September 30, 1998; corrected copy issued December 22, 1998). This Section 122(h) guidance explains that ability to pay parties are appropriate candidates for peripheral party cashouts (in Subsection II.B.3.a), outlines the basic terms of such settlements (in Subsections II.B.3.b and II.C), and explains when such settlements should be embodied in a judicially-approved consent decree rather than in an administrative settlement (in Subsection II.B.3.a). Ability to pay consent decrees should also be based on an ability to pay analysis, and require payment of an appropriate ability to pay amount, as outlined in the “General Policy on Superfund Ability to Pay Determinations” (September 30, 1997).]

Date of Issuance: January 11, 2001

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Department of Justice and the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Department or Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department or Agency may take action at variance with this model or its internal implementing procedures.

**MODEL CERCLA CASHOUT CONSENT DECREE
FOR SETTLEMENTS WITH ABILITY TO PAY PERIPHERAL PARTIES**

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF [_____]
[_____] DIVISION¹

)	
UNITED STATES OF AMERICA,)	
)	
[and)	
)	
THE STATE OF _____])	
)	
Plaintiff[s],)	
)	Civil Action No. _____
v.)	
)	Judge _____
[DEFENDANT])	
)	
Defendant.)	
)	

CONSENT DECREE

I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to Section[(s) 106 and] 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § [§ 9606 and] 9607, as amended (“CERCLA”), seeking [injunctive relief and] reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the [insert Site name] in [insert City, County, State] (“the Site”).

[___. The State of _____ (the “State”) also filed a complaint against the defendant in this Court alleging that the defendant is liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [list State laws cited in State’s complaint]. The State in its complaint seeks [insert relief sought].]

¹ Follow local rules for caption format.

B. The defendant that has entered into this Consent Decree (“Settling Defendant”) does not admit any liability to Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s].²

C. The United States has reviewed the Financial Information submitted by Settling Defendant to determine whether Settling Defendant is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, the United States has determined that Settling Defendant is able to pay the amounts specified in Section VI.

D. The United States and Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ [9606,] 9607 and 9613(b) and also has personal jurisdiction over Settling Defendant. Settling Defendant consents to and shall not challenge entry of this Consent Decree or this Court’s jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States [and the State], and upon Settling Defendant and its heirs, successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

² In situations where the court has entered summary judgment as to liability, we normally should preserve that result in a subsequent settlement by deleting this Paragraph B and replacing it with one that describes the summary judgment decision.

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.
- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.
- e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

[NOTE: Insert the following definition if the optional paragraph following Paragraph 8 on payment of proceeds of transfer of the Site or other real property is used.]

[___. "Fair Market Value" shall, except in the event of a foreclosure or transfer by deed or other assignment in lieu of foreclosure, mean the price at which the Property would change hands between a willing buyer and a willing seller under actual market conditions, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. In the event of a transfer by foreclosure, "Fair Market Value" shall mean the amount obtained at the foreclosure sale. In the event of a transfer by a deed or other assignment in lieu of foreclosure, "Fair Market Value" shall mean the balance of Settling Defendant's mortgage on the Property at the time of the transfer.]

- g. "Financial Information" shall mean those financial documents identified in Appendix ____.
- h. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.³

³ The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office
(continued...)

[NOTE: Insert the following definition if the optional paragraph following Paragraph 8 on payment of proceeds of transfer of the Site or other real property is used.]

[___. “Net Sales Proceeds” shall mean the total value of all consideration received by Settling Defendant for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) less i) the balance of Settling Defendant’s mortgage on the Property, ii) closing costs limited to those reasonably incurred and actually paid by Settling Defendant associated with the Transfer of the Property, and iii) federal and state taxes owed on the proceeds. Settling Defendant shall provide EPA and the State with documentation sufficient to show the total value of all consideration received by Settling Defendant for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) at the time of each Transfer, the amount of the proceeds of the Transfer, and the amounts corresponding to items i) through iii) above. This documentation shall include, but not be limited to, the report of an appraisal paid for by Settling Defendant, performed by an appraiser satisfactory to the Parties, upon appraisal assumptions satisfactory to the Parties. The documentation shall also include, either as part of the report or separately, 1) a tax statement showing the assessed valuation of the Property for each of the three years immediately preceding the Transfer, and 2) a schedule showing all outstanding indebtedness on the Property.]

i. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

j. “Parties” shall mean the United States[, the State of _____,] [and] the Settling Defendant.

k. “Plaintiff[s]” shall mean the United States [and the State].

[NOTE: Insert the following definition if the optional paragraph following Paragraph 8 on payment of proceeds of transfer of the Site or other real property is used. Modify definition if property to be sold is not part of the Site.] [___. “Property” shall mean that portion of the Site that is owned by Settling Defendant as of [insert date]. The Property is located at [insert address] in [insert City, County, State], and is designated by the following property description: _____.”]

l. “RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. § 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

m. “Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

³(...continued)

of Administration and Resource Management, Financial Management Division, Program and Cost Accounting Branch, at (202) 564-4972.

n. "Settling Defendant" shall mean [insert name].

o. "Site" shall mean the ____ Superfund site, encompassing approximately ____ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either "generally shown on the map included in Appendix ____" or "generally designated by the following property description: ____."]

[____. "State" shall mean the State (or Commonwealth) of ____.]

[If the Decree includes a payment to the State, insert the following definition.] [____. "State Response Costs" shall mean [insert definition], but not including amounts reimbursed to the State by EPA.]

[NOTE: Insert the following definition if the optional paragraph following Paragraph 8 on payment of proceeds of transfer of the Site or other real property is used.]

[____. "Transfer" shall mean each sale, assignment, transfer or exchange by Settling Defendant (or its successors or heirs) of the Property, or any portion thereof, or of an entity owning the Property, where title to the Property (or any portion or interest thereof) or to the entity owning the Property i) is transferred and Fair Market Value is received in consideration, or ii) is transferred involuntarily by operation of law, including foreclosure and its equivalents following default on the indebtedness secured, in whole or in part, by the Property, including, but not limited to, a deed or other assignment in lieu of foreclosure. A Transfer does not include a transfer pursuant to an inheritance or a bequest.]

p. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. STATEMENT OF PURPOSE

4. By entering into this Consent Decree, the mutual objective of the Parties is for Settling Defendant to make a cash payment to address its liability for the Site as provided in the Covenant Not to Sue by Plaintiff[s] in Section VIII, and subject to the Reservations of Rights by United States in Section IX.

VI. PAYMENT OF RESPONSE COSTS

[NOTE: Use the following Paragraph 5 when the Decree requires one lump-sum payment.]

5. Within 30 days of entry of this Consent Decree, Settling Defendant shall pay to the EPA \$____[, plus an additional sum for Interest on that amount calculated from [insert date, e.g., date of last cost summary] through the date of payment.]

[NOTE: Use the following alternative Paragraph 5 when the Decree includes an installment payment plan. The Regional attorney should discuss all proposed installment payment plans with the Regional Financial Management Office, including the minimum payment that may be processed, the minimum length of time between payments, the maximum length of the payment schedule, and the calculation of interest. When drafting an installment payment plan, keep in mind that Interest is a defined term.]

5. Settling Defendant shall pay to the EPA Hazardous Substance Superfund the principal sum of \$____, plus an additional sum for Interest as explained below. Payment shall be made in [insert number and, if applicable, insert, *e.g.*, quarterly, yearly] installments. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from [insert date, *e.g.*, date of last cost summary]. The first payment of \$____ shall be due within 30 days of entry of this Consent Decree. Subsequent payments of \$____ shall be due on [insert due dates for all subsequent payments or, *e.g.*, "January 1 of each year thereafter until all payments have been made."] Settling Defendant may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

6. **[NOTE: The following language should be used if the amount of each payment is above \$10,000.]** Payment[s] shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number _____, the EPA Region and Site Spill ID Number _____, and DOJ Case Number _____. Payment[s] shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the District of _____ following lodging of the Consent Decree. Any payment received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day.

[NOTE: The following alternative language may be used if the amount of each payment is below \$10,000.] Payment[s] shall be made by certified or cashier's check made payable to "U.S. Department of Justice," referencing the name and address of the party making payment, the EPA Region and Site Spill ID Number _____, and DOJ Case Number _____. Settling Defendant shall send [the] [each] check to:

[Insert address of Financial Litigation Unit of U.S. Attorney's Office for the District in which the Consent Decree will be entered]

7. At the time of [if installment payments, insert, "each"] payment, Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

8. The total amount [if installment payments, insert, "of each payment"] to be paid pursuant to Paragraph 5 shall be deposited in the [Site name] Special Account within the EPA

Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

[NOTE ON SPECIAL ACCOUNTS: Payments made under either Paragraph 5 may be deposited in the EPA Hazardous Substance Superfund or in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”). The Decree should include clear instructions indicating which portion of each payment is to be placed in the Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Under Paragraph 8 as written, 100% of the each payment will be deposited in a special account. The following language may be substituted if all or part of each payment will be deposited in the EPA Hazardous Substance Superfund.]⁴

[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:]

“The total amount [if installment payments, insert, “of each payment”] to be paid pursuant to Paragraph 5 shall be deposited in the EPA Hazardous Substance Superfund.”

[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]

“Of the total amount [if installment payments, insert, “of each payment”] to be paid pursuant to Paragraph 5 of this Consent Decree, [‘\$____’ or ‘____%’] shall be deposited in the EPA Hazardous Substance Superfund and [‘\$____’ or ‘____%’] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[If payment is to be made to a State, insert the following paragraph.] [____. Payment of State Response Costs. Within 30 days of entry of this Consent Decree, Settling Defendant shall pay to the State \$____ in reimbursement of State Response Costs, in the form of a certified or cashier’s check. The check shall be made payable to ____ and shall reference [insert name of case]. Settling Defendant shall send the check to:

[Insert address provided by State]]

⁴ When PRPs are performing the response action at the Site, payments to be made by Settling Defendants for future response costs and premiums may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account.

[NOTE: If Settling Defendant has a claim relating to the Site for insurance coverage or contractual indemnification, the negotiating team should consider whether a provision should be included under which EPA receives a percentage or a fixed amount of any potential recovery.]

[NOTE: The following optional paragraph may be included when appropriate if the Settling Defendant is the Site owner. It may also be used when appropriate for recovery of proceeds from the sale of real property which is not part of the Site.]

[___. Payment of Proceeds of Sale of Property. Settling Defendant agrees that it will not sell, assign, transfer or exchange the Property except by means of a Transfer. [NOTE: If Settling Defendant is obligated to attempt to sell the Property as a condition of this Consent Decree insert, “Settling Defendant shall use its best efforts to Transfer the Property within ___ [days/months] of entry of this Consent Decree.”]

a. In addition to the payment[s] made under Paragraph 5 [insert reference to any other payment provisions], Settling Defendant shall pay to EPA ___% [if potential recovery may exceed total amount sought from Settling Defendant insert “or \$___, whichever is lesser,”] of the Net Sales Proceeds of the Transfer of the Property. Payment shall be made to EPA within __ [e.g., 15] days of the effective date of the Transfer of the Property.

b. Payment shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund. The check, or a letter accompanying each check, shall identify the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID # ____, and DOJ Case Number _____, and shall be sent to:

EPA-Superfund

[Insert appropriate Regional Superfund lockbox number and address]

Settling Defendant shall send notice that payment has been made in accordance with Paragraph 7 above, and the payment shall be deposited in accordance with Paragraph 8 above. **[NOTE: If the deposit instructions in Paragraph 8 do not apply to this payment, include alternative instructions here.]**

c. At least 30 days prior to any such Transfer, Settling Defendant shall notify EPA of the proposed transfer, which notice shall include a description of the property to be sold, the identity of the purchaser, the terms of the transfer, the consideration to be paid, and a copy of the Transfer agreement. The proposed sales price must be at least equal to the Fair Market Value of the Property based upon an appraisal obtained within 1 year of the Transfer. Settling Defendant shall notify EPA of the completion of the Transfer within 10 days of the date of closing and shall include with such notification a copy of the closing binder, including final executed documentation for the conveyance and a work sheet setting forth the Net Sales Proceeds and the amount payable to EPA.

d. In the event of a Transfer of the Property or any portion thereof, Settling Defendant shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Consent Decree, except if EPA and Settling Defendant modify this Consent Decree in writing.] **[NOTE: If Settling Defendant is not obligated to attempt to sell the Property as a condition of this Consent Decree insert, “Nothing in this Paragraph obligates Settling Defendant to Transfer the Property or an portion thereof.”]**

[NOTE: If financial circumstances exist which would justify inclusion of additional conditional payments, such as payment of a percentage of future earnings or a percentage of the proceeds of a future sale of assets other than the Site or other real property, such a provision may be included here.]

VII. FAILURE TO COMPLY WITH CONSENT DECREE

9. **[NOTE: Use this Paragraph 9 when the Consent Decree requires one lump-sum payment.]** Interest on Late Payments. If Settling Defendant fails to make any payment under Paragraph 5 [also reference State payment, if any, and any other payment provisions] by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

9. **[NOTE: Use this alternative Paragraph 9 when the Consent Decree includes an installment payment plan.]** Interest on Late Payments. If Settling Defendant fails to make any payment under Paragraph 5 by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received. [If State payment or any other payment provisions are included insert, “If Settling Defendant fails to make any payment under Paragraph(s) ___ by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.”]

10. Stipulated Penalty.

a. If any amounts due under Paragraph 5 [also reference State payment, if any, and any other payment provision] are not paid by the required date, Settling Defendant shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 9, \$_____ per violation per day that such payment is late.

[NOTE: If the Consent Decree includes any non-payment obligations for which a stipulated penalty is due, insert, “If Settling Defendant does not comply with [reference sections containing non-payment obligations], Settling Defendant shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, \$_____ per violation per day of such noncompliance.” Escalating penalty payment schedules may be used for payment or non-payment obligations.]

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA [or the State]. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number _____, and DOJ Case Number _____, and shall be sent to:

EPA Superfund
[Insert Regional lockbox number and address]

c. At the time of each payment, Settling Defendant shall send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

[NOTE: If applicable, insert State payment instructions for stipulated penalties for failure to pay State Response Costs.]

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA [or the State] has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations, insert, “or performance”] is due [if non-payment obligations are included, insert, “or the day a violation occurs,”] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, “or the final day of correction of the noncompliance or completion of the activity.”] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

11. If the United States [or the State] brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States [and the State] for all costs of such action, including but not limited to costs of attorney time.

12. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff[s] by virtue of Settling Defendant’s failure to comply with the requirements of this Consent Decree.

13. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendants from payment as required by Section VI or from performance of any other requirements of this Consent Decree.

[NOTE: If Settling Defendant is a Site owner, insert the following Section.]

[_____. RELEASE OF NOTICE OF FEDERAL LIEN]

[_____. Within ____ days after EPA receives [if installment payment plan insert “the final”] payment required by Paragraph 5 of this Consent Decree [or “within ____ days after closing” if Decree provides for sale of site or other real property], EPA shall file a Release of Notice of Federal Lien in the Recorder’s Office [or Registry of Deeds or other appropriate office], _____ County, State of _____. The Release of Notice of Federal Lien shall release the Notice of Federal Lien filed on [insert date and file number of lien] and shall not release any other lien or encumbrance which may exist upon the Property.]

VIII. COVENANT NOT TO SUE BY PLAINTIFF[S]

14. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,]⁵ with regard to the Site.⁶ With respect to present and future liability, this covenant shall take effect upon receipt by EPA of [for lump sum payments, insert “all amounts required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Consent Decree).”] [for installment payment plans, insert “the first payment required by Section VI, Paragraph 5 (Reimbursement of Response Costs).”] This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree[.] [for installment payment plans, including any conditional payment obligations, continue sentence with “, including but not limited to, payment of all amounts due under Section VI (Payment of Response Costs), and any amount due under Section VII (Failure to Comply with Consent Decree).”] This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by Settling Defendant. If the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Defendant shall forfeit all payments made pursuant to this Consent Decree and this covenant not to sue and the contribution protection in Paragraph 21 shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States’ right to pursue any other causes of action arising from Settling Defendant’s false or materially inaccurate information. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

⁵ Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

⁶ This covenant assumes that EPA has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed.

IX. RESERVATION OF RIGHTS BY UNITED STATES⁷

15. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 14. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:

- a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

[NOTE: The precise terms of subparagraph d may need to be changed if Settling Defendant has a continuing relationship with the Site.] d. liability, based upon Settling Defendant's ownership or operation of the Site, or upon Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendant; and

- e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

16. Notwithstanding any other provision of this Consent Decree, EPA reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information provided by Settling Defendant, or the financial certification made by Settling Defendant in Paragraph 26, is false or, in an material respect, inaccurate.

[NOTE: If the State is a co-plaintiff, insert separate paragraphs for the State's covenant not to sue Settling Defendant and reservation of rights.]

⁷ On a case-by-case basis, EPA and DOJ may consider using an unknown conditions reopener in an ability to pay consent decree in addition to the other reservations of rights included in this section. Because use of this reopener presents case-specific drafting issues, Regions should contact OECA when considering this alternative.

X. COVENANT NOT TO SUE BY SETTLING DEFENDANT

17. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States [or the State], or its [their] contractors or employees, with respect to the Site⁸ or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.⁹

Except as provided in Paragraph 19 (Waiver of Claims) and Paragraph 23 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States [or the State] brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 16 (c) - (e), but only to the extent that Settling Defendant's claims arise from the same response action or response costs that the United States [or the State] is seeking pursuant to the applicable reservation.

18. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

19. Settling Defendant agrees not to assert any CERCLA claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any other person[, except as provided in Paragraph ____” (cross-reference provision in Section VI, if any, on future recovery from insurance or contractual indemnification claims concerning the Site)]. [This waiver

⁸ If the Decree does not cover the Site as a whole, the reference to “the Site” here and in Subparagraph 17(b) should be narrowed to conform to the intended scope of the Consent Decree.

⁹ The settlement should, wherever possible, release or resolve any claims by Settling Defendant against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Defendant.]

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

20. Except as provided in Paragraph 19, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Decree may have under applicable law. Except as provided in Paragraph 19, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

21. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person. The “matters addressed” in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendant coming within the scope of such reservations.¹⁰

22. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ [and the State] within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

23. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other relief relating to the Site,

¹⁰ This definition of “matters addressed” assumes that this Decree is designed to resolve fully Settling Defendant’s liability at the Site pursuant to Sections 106 and 107(a) of CERCLA, subject only to the reservations of rights. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed.

Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States [or the State] in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff[s] set forth in Section VIII.

[___. ACCESS (AND INSTITUTIONAL CONTROLS)]

[NOTE: This Section should be used only if Settling Defendant is a Site owner or otherwise controls access to the Site or to other property to which access is needed. Subparagraph (a) of the first paragraph should be used to secure access. Subparagraph (b) of the first paragraph should be included if EPA determines that land/water use restrictions are needed on property owned by the Settling Defendant to ensure the integrity or protectiveness of the remedial action. Subparagraph (c) of the first paragraph should be included if EPA determines that a property interest running with the land (granting either a right of access or a right to enforce land/water use restrictions) should be acquired by EPA or another grantee from the Settling Defendant.]

[___. If the Site, or any other property where access and/or land/water use restrictions are needed to implement response activities at the Site, is owned or controlled by Settling Defendant, Settling Defendant shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States[, the State,] and its [their] representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;
2. Verifying any data or information submitted to the United States [or the State];
3. Conducting investigations relating to contamination at or near the Site;
4. Obtaining samples;
5. Assessing the need for, planning, or implementing additional response actions at or near the Site;
6. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section __ (Access to Information);

7. Assessing Settling Defendant's compliance with this Consent Decree;
and

8. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. commencing on the date of lodging of this Consent Decree, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity or protectiveness of the [removal or] remedial measures to be performed at the Site; and

c. execute and record in the Recorder's Office [or Registry of Deeds or other appropriate land records office] of _____ County, State of _____, an easement, running with the land, that (i) grants a right of access for the purpose of conducting response activities at the Site, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph __ (b) [cross-reference immediately preceding paragraph] of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the [removal or] remedial measures to be performed at the Site. Settling Defendant shall grant the access rights and the rights to enforce the land/water use restrictions to [(i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) and/or other appropriate grantees].¹¹ Settling Defendant shall, within 45 days of entry of this Consent Decree,¹² submit to EPA for review and approval with respect to such property:

1. a draft easement, in substantially the form attached hereto as Appendix __, that is enforceable under the laws of the State of _____, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and

2. current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

¹¹ If, at the time that a Consent Decree is being negotiated, EPA is not able to determine which persons should be the grantees of the easement, this Subparagraph c should be redrafted to insert the phrase "one or more of the following persons, as determined by EPA," prior to the bracketed list of potential grantees.

¹² If, at the time that a Consent Decree is being negotiated, EPA is unable to determine whether it wants to obtain an easement that runs with the land, but believes that it might want to obtain such an interest in the future, this Subparagraph c should be redrafted to insert the phrase "if EPA so requests," at the beginning of the subparagraph, and Settling Defendant should be required to submit the draft easement a certain number of days from the date of EPA's request.

Within 15 days of EPA's approval and acceptance of the easement, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, record the easement with the Recorder's Office [or Registry of Deeds or other appropriate office] of ____ County. Within 30 days of recording the easement, Settling Defendant shall provide EPA with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

____. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement response activities at the Site, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with EPA's [and the State's] efforts to secure such governmental controls.

____. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its [their] access authorities and rights, as well as all of its [their] rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.]

[. ACCESS TO INFORMATION¹³]

[____. Settling Defendant shall provide to EPA [and the State], upon request, copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to activities at the Site [if needed, include "or to the implementation of this Consent Decree"], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

____. Confidential Business Information and Privileged Documents.

a. Settling Defendant may assert business confidentiality claims covering part or all of the records submitted to Plaintiff[s] under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA [and the State], or if EPA has notified Settling Defendant that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2,

¹³ Include this section only if Settling Defendant has been or will be involved in cleanup efforts at the Site or if Settling Defendant may possess information which may assist the Agency in its cleanup or enforcement efforts.

Subpart B, the public may be given access to such records without further notice to Settling Defendant.

b. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing records, it shall provide Plaintiff[s] with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

—. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other records evidencing conditions at or around the Site.]

XII. RETENTION OF RECORDS

[NOTE: Paragraphs 24 and 25 may be deleted in ability to pay peripheral party settlements if the Region believes that all relevant records have already been provided to EPA. If they are deleted, change the title of this Section to Certification and make a conforming change to the title in the Table of Contents.]

24. Until [10] years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

25. After the conclusion of the document retention period in the preceding paragraph, Settling Defendant shall notify EPA and DOJ [and the State] at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ [or the State], Settling Defendant shall deliver any such records to EPA [or the State]. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide Plaintiff[s] with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

26. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site, and that it has fully complied with any and all EPA requests for information regarding the Site and Settling Defendant's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927; and

b. submitted to EPA Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time Settling Defendant executes this Consent Decree.

XIII. NOTICES AND SUBMISSIONS

27. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, [the State,] and Settling Defendant, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # _____)
P.O. Box 7611
Washington, D.C. 20044-7611

As to EPA:

[Insert names and addresses of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

[As to the State:

Insert name and address of State contact if the State is a party to the Consent Decree]

As to Settling Defendant:

[Insert name and address]

XIV. RETENTION OF JURISDICTION

28. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XV. INTEGRATION[/APPENDICES]

29. This Consent Decree and its appendices constitute the final, complete and exclusive Consent Decree and understanding between the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

["Appendix A" is the map of the Site;]

"Appendix B" is a list of the financial documents submitted to EPA by Settling Defendant;" etc.

XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

30. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

31. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

XVII. SIGNATORIES/SERVICE

32. Each undersigned representative of Settling Defendant to this Consent Decree and the [Assistant Attorney General for the Environment and Natural Resources Division]¹⁴ of the United States Department of Justice [insert State official] certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

¹⁴ Substitute Chief/Deputy Chief, Environmental Enforcement Section, where the case involves a site where site costs do not exceed \$20 million and the size of the compromise does not exceed \$1 million, or where the settlement is with an individual defendant and the settlement does not exceed \$1 million.

33. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

34. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. [The Parties agree that Settling Defendant need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.]

XVIII. FINAL JUDGMENT

35. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between [and among] the United States[, the State,] and Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ____ DAY OF _____, 2____.

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR THE UNITED STATES OF AMERICA

[Name]
United States Attorney
[Address]

[Name]
Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

Date: _____

[Name]
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

[Name]¹⁵
Assistant Administrator for Enforcement and
Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

[Name]
Regional Administrator, Region []
U.S. Environmental Protection Agency
[Address]

[Name]
Assistant Regional Counsel
U.S. Environmental Protection Agency
[Address]

¹⁵ Include AA-OECA signature block only if he or she has a concurrence role under current Headquarters review procedures.

[THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR THE STATE OF [_____]

Date: _____

[Names and addresses of State signatories]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the _____ Superfund Site.

FOR DEFENDANT [_____]

Date: _____
[Names and addresses of Defendant's signatories]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: _____

Title: _____

Address: _____